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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/767,396	01/23/2004	Terry Keith Bryant		8942

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EXAMINER

ASTORINO, MICHAEL C

ART UNIT PAPER NUMBER

3736

DATE MAILED: 07/28/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No. 10/767,396	Applicant(s) BRYANT, TERRY KEITH	
	Examiner Michael C. Astorino	Art Unit 3736	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on January 2004.
- 2a) ☐ This action is FINAL.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1 and 2 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1 and 2 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on January 2004 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

**DETAILED ACTION***Drawings*

The drawings are objected to as failing to comply with 37 CFR 1.84(p)(5) because all of the reference character(s) are not mentioned in the description. Corrected drawing sheets in compliance with 37 CFR 1.121(d), or amendment to the specification to add the reference character(s) in the description in compliance with 37 CFR 1.121(b) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

*Specification*

The following guidelines illustrate the preferred layout for the specification of a utility application. These guidelines are suggested for the applicant's use.

**Arrangement of the Specification**

As provided in 37 CFR 1.77(b), the specification of a utility application should include the following sections in order. Each of the lettered items should appear in upper case, without underlining or bold type, as a section heading. If no text follows the section heading, the phrase "Not Applicable" should follow the section heading:

**(a) TITLE OF THE INVENTION.**

**(b) CROSS-REFERENCE TO RELATED APPLICATIONS.**

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- (c) STATEMENT REGARDING FEDERALLY SPONSORED RESEARCH OR DEVELOPMENT.
- (d) THE NAMES OF THE PARTIES TO A JOINT RESEARCH AGREEMENT
- (e) INCORPORATION-BY-REFERENCE OF MATERIAL SUBMITTED ON A COMPACT DISC (See 37 CFR 1.52(e)(5) and MPEP 608.05. Computer program listings (37 CFR 1.96(c)), "Sequence Listings" (37 CFR 1.821(c)), and tables having more than 50 pages of text are permitted to be submitted on compact discs.) or  
REFERENCE TO A "MICROFICHE APPENDIX" (See MPEP § 608.05(a). "Microfiche Appendices" were accepted by the Office until March 1, 2001.)
- (f) BACKGROUND OF THE INVENTION.**
  - (1) Field of the Invention.
  - (2) Description of Related Art including information disclosed under 37 CFR 1.97 and 1.98.
- (g) BRIEF SUMMARY OF THE INVENTION.**
- (h) BRIEF DESCRIPTION OF THE SEVERAL VIEWS OF THE DRAWING(S).**
- (i) DETAILED DESCRIPTION OF THE INVENTION.**
- (j) CLAIM OR CLAIMS (commencing on a separate sheet).
- (k) ABSTRACT OF THE DISCLOSURE (commencing on a separate sheet).
- (l) SEQUENCE LISTING (See MPEP § 2424 and 37 CFR 1.821-1.825. A "Sequence Listing" is required on paper if the application discloses a nucleotide or amino acid sequence as defined in 37 CFR 1.821(a) and if the required "Sequence Listing" is not submitted as an electronic document on compact disc).

Note to applicant: The bolded section headings above need to added to the specification.

In regards to the **TITLE OF THE INVENTION**, the title of the invention in the Oath and Declaration does not match the Title on the first page of the specification. In addition, the title of the invention, is 41 words long. The applicant should attempt be more concise with the title.

In regards to the **CROSS-REFERENCE TO RELATED APPLICATIONS**, proper recitation of the domestic priority is cited as, "This application claims the benefit of U.S. Provisional Application No. 60/458,176, filed March 27, 2003, and U.S. Provisional Application No. 60/379,908, filed May 11, 2002."

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A substitute specification including the claims is required pursuant to 37 CFR 1.125(a) because the number or nature of the amendments render it difficult to consider the application:

A substitute specification must not contain new matter. The substitute specification must be submitted with markings showing all the changes relative to the immediate prior version of the specification of record. The text of any added subject matter must be shown by underlining the added text. The text of any deleted matter must be shown by strike-through except that double brackets placed before and after the deleted characters may be used to show deletion of five or fewer consecutive characters. The text of any deleted subject matter must be shown by being placed within double brackets if strike-through cannot be easily perceived. An accompanying clean version (without markings) and a statement that the substitute specification contains no new matter must also be supplied. Numbering the paragraphs of the specification of record is not considered a change that must be shown.

Additionally, please make certain to use 12 point type face for the specification.

**Note to applicant:** The foregoing claim objections, rejections under 35 U.S.C. 101, 35 U.S.C. 112, second paragraph, and 35 U.S.C. 102 are merely exemplary. The claims are so indefinite that it is virtually impossible for the examiner to determine exactly what the applicant is intending to claim. The following rejection therefore is of necessity, based on the examiner's best guess of what applicant is trying to claim.

### *Claim Objections*

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Claims I, and II are objected to because of the following informalities: the claims and claim numbers are not in accordance with 37 CFR 1.75. The use of Roman numerals is improper. Please see 37 CFR 1.75 and MPEP § 608.01 (i), (j), (k), (m), (n), (o), (p). The examiner will refer to these claims as claims 1 and 2 instead of claims I and II.

### *Claim Rejections - 35 USC § 101*

35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

**Claim 2 (II)** is rejected under 35 U.S.C. 101 because it recites overlapping statutory classes. Claim II positively recites method steps and apparatus components in a single claim. See MPEP 2173.05(p)II.

### *Claim Rejections - 35 USC § 112*

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter, which the applicant regards as his invention.

**Claims 1 (I), and 2 (II)** are rejected as failing to define the invention in the manner required by 35 U.S.C. 112, second paragraph.

The claim(s) are narrative in form and replete with indefinite and functional or operational language. The structure which goes to make up the device must be clearly and positively specified. The structure must be organized and correlated in such a manner as to

present a complete operative device. The claims must be in one sentence form only. Note the format of the claims in the patents cited.

Note to applicant: the applicant should at least remove the words new, shall, which, as well as, it's, but not limited to, such as, . The applicant should also remove words in between parentheticals, see claim 2 (II) (9)

The examiner cannot discern when if Claims 1 (I), and 2 (II) are intended to have dependent claims. Claim 1, (I), lists 1) – 3) after a semi-colon, which is indicative of an independent claim. However, Claim 1 (I)-1), starts again with another method. Claim 2 (II) does the same at 2 (II)-2), 13b), 13c). Additionally, the applicant may have intended claim 1 (I)-2) and 1-3) to be dependent method steps. The same intention may have been attempted with 2 (II)-1)-17).

### *Claim Rejections - 35 USC § 102*

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

Claims 1 and 2 (I and II) are rejected under 35 U.S.C. 102(b) as being anticipated by Edwards et al, U.S. Patent No. 6,126,613 A (Edwards).

In regards to claim 1 (I), Edwards teaches a method for using an incentive spirometer for improving lung performance by providing audibly and verbally instructions prompting the user of the spirometer and guiding the user through steps in operating the medical apparatus (see col. 2, lines 26-29 and col. 11, lines 13-17).

In regards to the structure of the apparatus of claim 2 (II), Edwards teaches an incentive spirometer for improving lung performance by providing audibly and verbally instructions prompting the user of the spirometer and guiding the user through steps in operating the medical apparatus (see col. 2, lines 26-29 and col. 11, lines 13-17), comprising: sensors 131 and 153 (rotation detector and air composition detector) producing output signals and measuring human or therapeutic performance (see col. 6, lines 43-47, and col. 7, lines 18-22); a module 132 for a central processing unit (computerized device) (see col. 7, line 20); a module (voice system containing prerecorded instructions) for storing of program instructions, audio signals, and generating audible sound (see col. 11, lines 13-15); a module 302 (power source or battery) for conserving electrical power (see col. 11, lines 19-21); a module (counter or clock) determining accurate intervals of time (see col. 10, line 65 to col. 11, line 6); a module 135 (wireless transmitter) communicating remotely with a separate agent (see col. 11, line 23); and program instructions (software) controlling the actions or functions of the central processing unit or processor relating to the function of the spirometer and the "voice system" for operating the spirometer (see col. 11, line 17-19).

### *Conclusion*

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. McKinnon et al, U.S. Patent No. 6,190,326 B1, teaches a spirometer device and method for using a spirometer by providing audibly and verbally instructions prompting the user and guiding the user through steps in operating the medical device which can be interpreted to teach some aspects of the applicant's claimed invention.



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The following patents teaches emergency therapy devices and methods providing audibly and verbally instructions prompting the user of the emergency device and guiding the user through steps in operating the device which can be interpreted to teach some aspects of the applicant's claimed invention: Feder, U.S. Patent No. 6,758,811 B1; Parker et al, U.S. Patent No. 6,668,192 B1; Russell, U.S. Patent No. 6,493,581 B2; Nova et al, U.S. Patent No. 6,334,070 B1; Kirchgeorg et al, U.S. Patent No. 6,327,497 B1; and Parker et al, U.S. Patent No. 4,588,383 A.


The following patents teaches medical devices and methods providing audibly and verbally instructions prompting the user and guiding the user through steps in operating the medical device which can be interpreted to teach some aspects of the applicant's claimed invention: Peddicord et al, U.S. Patent No. 6,402,691 B1; Portwood et al, U.S. Patent No. 5,950,630 A; and Kikuchi, U.S. Patent No. 5,008,942 A.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to **Michael C Astorino** whose telephone number is **571-272-4723**. The examiner can normally be reached on Monday-Friday, 8:30AM to 3:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Max Hindenburg can be reached on 571-272-4726. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

A handwritten signature in black ink, appearing to read 'MA', with a large, sweeping horizontal stroke extending to the right.

Michael Astorino  
July 25, 2005